

Agency official authorized to advance this administrative penalty action.

The complaint was filed under the statutory authority set forth in Section 3008(a) of the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments (HSWA) of 1984, 42 U.S.C. § 6928(a).

Complainant alleged Respondent violated the interim status requirements (failure to submit a closure plan and obtain a permit) under RCRA, and the implementing regulations. See 40 C.F.R. §§ 265 and 270. The next item reflected in the administrative record file includes an Order to Show Cause issued by this tribunal. This Order, served to Complainant's legal representative by hand, required Complainant to file information demonstrating why it failed to prosecute the administrative penalty action. Although many months have since passed, Complainant failed to file such information for inclusion in the administrative record. Due to these and other facts cited below, applicable regulations and legal authorities, Complainant's December 30, 1987, complaint is dismissed.

REGULATORY AND STATUTORY STANDARD OF REVIEW

Section 3008(a) authorizes EPA to commence administrative and civil actions whenever it determines a person has

violated, or is in violation of hazardous waste management requirements under RCRA and implementing regulations. Administrative actions, such as this Class II penalty proceeding, are governed by procedures set forth in the Consolidated Rules of Practice Governing The Administrative Assessment of Civil Penalties (Consolidated Rules). The Consolidated Rules were revised on July 23, 1999, and this proceeding is subject to the new rules. See 40 C.F.R. Part 22, published at 64 Fed. Reg. 40138 (July 23, 1999).² Several sections in Part 22 deserve attention here. First, 40 C.F.R. § 22.16(c) authorizes Regional Judicial Officers to adjudicate all Class II proceedings prior to the filing of an answer.

Next, Complainant must file the original complaint with the Regional Hearing Clerk, and prove service of the same by filing an affidavit or properly executed return receipt. See 40 C.F.R. §§ 22.5(a) and (b). If Complainant is unable to effectuate service upon a Respondent and decides not to proceed in the administrative penalty action, then withdrawal under 40 C.F.R. § 22.14(d), seems proper. In any event, under

² The revised Consolidated Rules are applicable to all EPA administrative penalty proceedings, unless to do so would result in substantial injustice. As both parties demonstrated little to no interest in resolving this administrative penalty action, there is no substantial injustice imposed on either party.

the Administrative Procedure Act (APA), 5 U.S.C. § 555(b), federal agencies, including EPA, are required to proceed with reasonable dispatch during all administrative actions.

Cases like this one, where Complainant fails to comply with a prehearing order, trigger default proceedings. See 40 C.F.R. 22.17(a). The end result of such a default is as follows:

"Default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice." 40 C.F.R. § 22.17(a).

Further, it is noteworthy that federal civil actions may be dismissed with prejudice, for failure to prosecute. See Fed. R. of Civ. P. 41(b). Although the above rule is not applicable to 40 C.F.R. Part 22 administrative penalty cases per se, it is relevant, and serves as a useful guide in the administration of justice.³

DISCUSSION

Based on record evidence, dismissal of the administrative complaint with prejudice under Section 22.17(a) is warranted here. Record information shows that Complainant initiated this action in December 1987. Since that time, Complainant

³ Note that Rule 41(b) is similar to 40 C.F.R. § 22.17(a). Both provide for dismissal of actions with prejudice, for failure to comply with court/tribunal orders.

did not proceed at all, as the administrative record file fails to include additional filings by Complainant.

Such a delay without any justification also conflicts with Rule 41(b) of the Fed. R. of Civ. P., and Section 555(b) of the APA. See *In Re International Chemical Workers Union*, 958 F.2d 1144, 1149-1150 (D.C. Cir. 1992). Although given the opportunity by way of a November 1997, Order to Show Cause, Complainant failed to submit any information addressing the unjustified delay in prosecution. In similar fashion, Complainant submitted no information curing the procedural (failure to prove service of the complaint to Respondent) defect identified by this tribunal. Based upon the administrative record file, Respondent never received the complaint, as it (the record) fails to include either an affidavit, or a properly executed return receipt. Service of the complaint is unproved as required by 40 C.F.R. § 22.5(b).

Complainant failed to withdraw this case when it could have rightfully done so under 40 C.F.R. § 22.14(d), and as provided in the Order to Show Cause. The facts show that Complainant simply failed to respond to the Order to Show Cause. Because of such disregard and applicable regulation [40 C.F.R. § 22.17(a)], Complainant cannot avoid the

consequence, dismissal of the complaint with prejudice. See *In re Rybond, Inc.*, 6 E.A.D. 614, 626-627, (EAB 1996).

ORDER

Due to the unreasonable delay in prosecution, failure to prove service of the complaint pursuant to 40 C.F.R. § 22.5(b), and Complainant's unexplained default under 40 C.F.R. § 22.17(a), this case is hereby dismissed with prejudice.

Under 40 C.F.R. § 22.30(a), within thirty (30) after service of the initial decision, any party may appeal an adverse ruling or order of the Presiding Officer by filing a notice of appeal and an accompanying brief with the Environmental Appeals Board (EAB). Any other party or non-party participant may respond to the appeal notice and brief within twenty (20) days after service of the appeal notice and brief. Parties seeking to reopen a hearing for submission of further evidence must file such a pleading within twenty (20) days after service of the initial decision. See 40 C.F.R. § 22.28(a).

Otherwise, pursuant to 40 C.F.R. § 22.27(c), this Order And Reasons Dismissing Complaint is a final order forty-five (45) after service. Notwithstanding, under 40 C.F.R. § 22.30(b), the EAB may on its own initiative, elect to review

this Order And Reasons Dismissing Complaint with prejudice
within forty-five (45) days after service.

SO ORDERED, this 18TH day of February 2000.

_/S/_____
GEORGE MALONE, III
REGIONAL JUDICIAL OFFICER

In the Matter of Colonial Heritage Corporation, Respondent,
Docket No. RCRA VI-801-H

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, Regional Hearing Clerk for the Region 6, U.S. Environmental Protection Agency located in Dallas, Texas, hereby certify that I served true and correct copies of the foregoing Order dated February 18, 2000, on the persons listed below, in the manner and date indicated:

Mr. Jack Schrader
Registered Agent for Service
on Colonial Heritage Corporation
209 E. Plumb Lane
Reno, Nevada 89502

U.S. CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Marvin Benton, Esq.
U.S. EPA - Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

HAND DELIVERY

Date:

Lorena S. Vaughn
Regional Hearing Clerk